

90-930

Supreme Court, U.S.
FILED

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JOSEPH F. SPANIOLO, JR.
CLERK

NO.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1990

ANTHONY BARTELS,

Petitioner,

v.

LOUIS W. SULLIVAN,
SECRETARY OF HEALTH AND HUMAN SERVICES,

Respondent.

WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ANTHONY W. BARTELS
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Pro se.

QUESTION PRESENTED

Did the district court err in dismissing the Petitioner's request for injunctive relief prohibiting the Secretary from denying the Petitioner due process by releasing payments to disability claimants prior to payment of the Petitioner's full attorney's fees, thereby requiring the Petitioner to attempt unsuccessfully to collect the fees from the claimants and then file suit against the Secretary?

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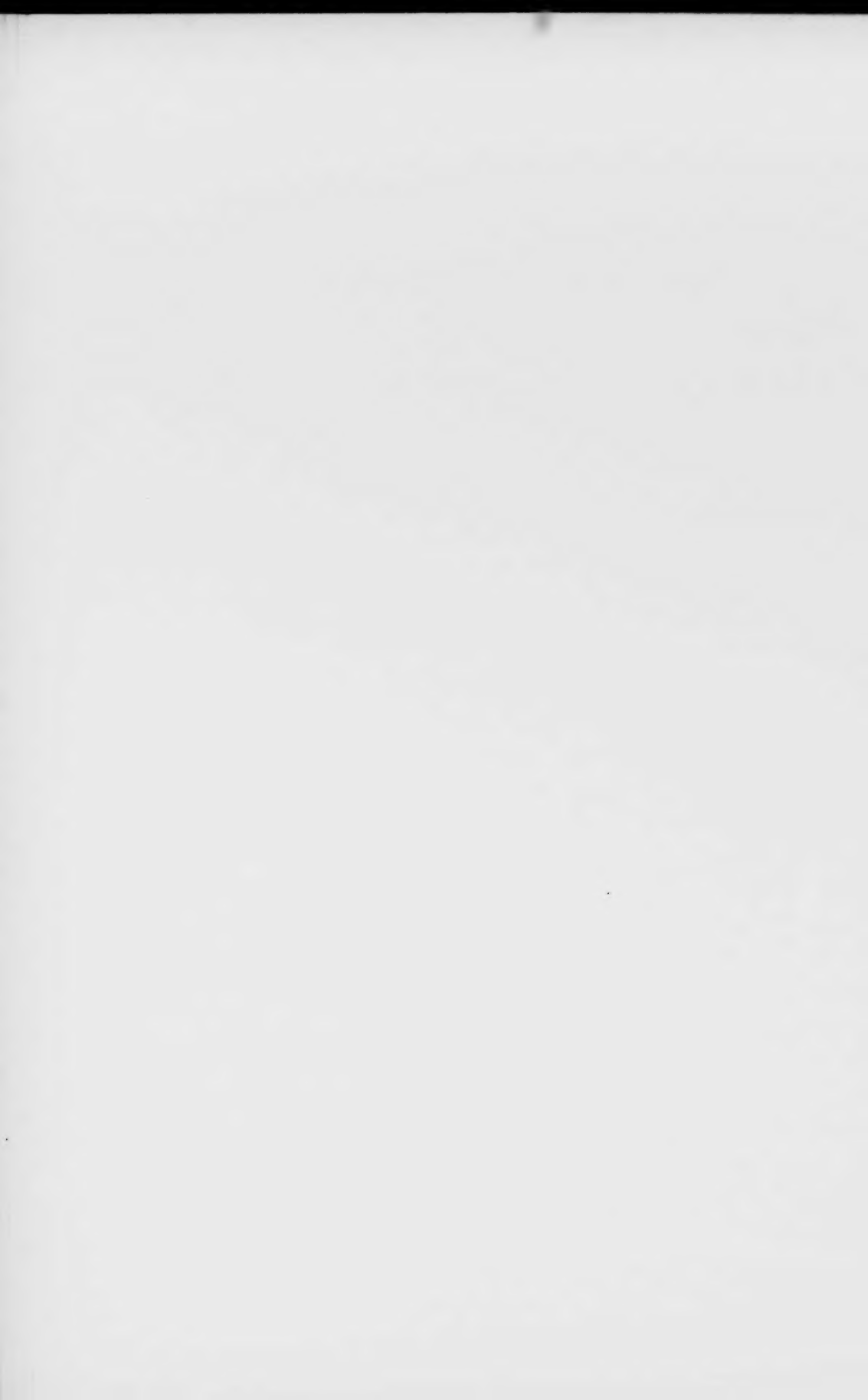
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OPINIONS BELOW

The decision of the Eighth Circuit Court of Appeals denying the Petitioner's appeal was filed on August 17, 1990, and appears in the Appendix at A-1. The district court's ruling in the case of Thomas Sanderson was filed on December 14, 1989, and appears in the Appendix at A-5. The decision of the district court in the case of Thomas Frazer was filed on December 27, 1989, and appears in the Appendix at A-14.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The Eighth Circuit's opinion was issued on August 17, 1990, and the court denied a Petition for Rehearing on September 24, 1990.

CONSTITUTIONAL AND
STATUTORY PROVISIONS INVOLVED

The due process clause of the fifth amendment to the United States Constitution states in part that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law[.]"

42 U.S.C. §§ 405(g) and (h) and 406 are set forth in the Appendix.

STATEMENT OF THE CASE

The Petitioner, Anthony W. Bartels, successfully represented two claimants, Thomas Sanderson and Thomas Frazer, before the Social Security Administration (SSA) on claims for disability benefits. In each case, a contract was signed between the claimant and Bartels entitling Bartels to one-fourth of the claimant's past-due benefits as attorney's fees if the case was won.

In the case of Sanderson, the Secretary determined that he was entitled to \$23,353.00 as the amount of past-due benefits. Pursuant to 42 U.S.C. § 406 (a), 25% of that amount, \$5,838.25, was withheld by the Secretary for the possible payment of attorney's fees. The SSA then determined on January 30, 1989 that Bartels was authorized to collect a

fee of \$4,000.00 for legal services provided at the administrative level, and this amount was certified for payment by the Secretary to Bartels. On February 22, 1989, the balance, \$1,838.25, was released to Sanderson.

Bartels initiated an administrative review of the amount authorized by the SSA, and after consideration of his request the SSA increased the authorization for attorney's fees by \$500.00 to \$4,500.00 on April 17, 1989. Because the withheld funds had already been released to Sanderson, the SSA instructed Bartels to collect the balance directly from Sanderson. Bartels attempted to do so, but was unsuccessful, and on May 26, 1989 requested the SSA to create an overpayment of \$500.00. The SSA responded with a letter on July 2, 1989, again instructing

Bartels to look to Sanderson for collection of the \$500.00.

Bartels then filed suit in district court seeking damages in the amount of the balance of the authorized fee and seeking an injunction against the SSA to enjoin the SSA from releasing funds to the claimants before attorney's fees are completely paid.

In the case of Thomas Frazer, a favorable administrative determination was reached on February 17, 1989, resulting in an award of \$5,032.00 in past-due benefits. Subsequently, the SSA withheld \$1,248.00 for a possible award of attorney's fees. On May 2, 1989, the SSA authorized a fee of \$1,258.00, and certified that amount for payment on July 10. On May 23, 1989, the SSA calculated the amount of past-due benefits to which

Frazer's auxiliaries were entitled as being \$2,826.00. Twenty-five percent of that amount was first withheld, and then, since the payment of attorney's fees had been certified, was released to the auxiliaries on July 10, 1989.

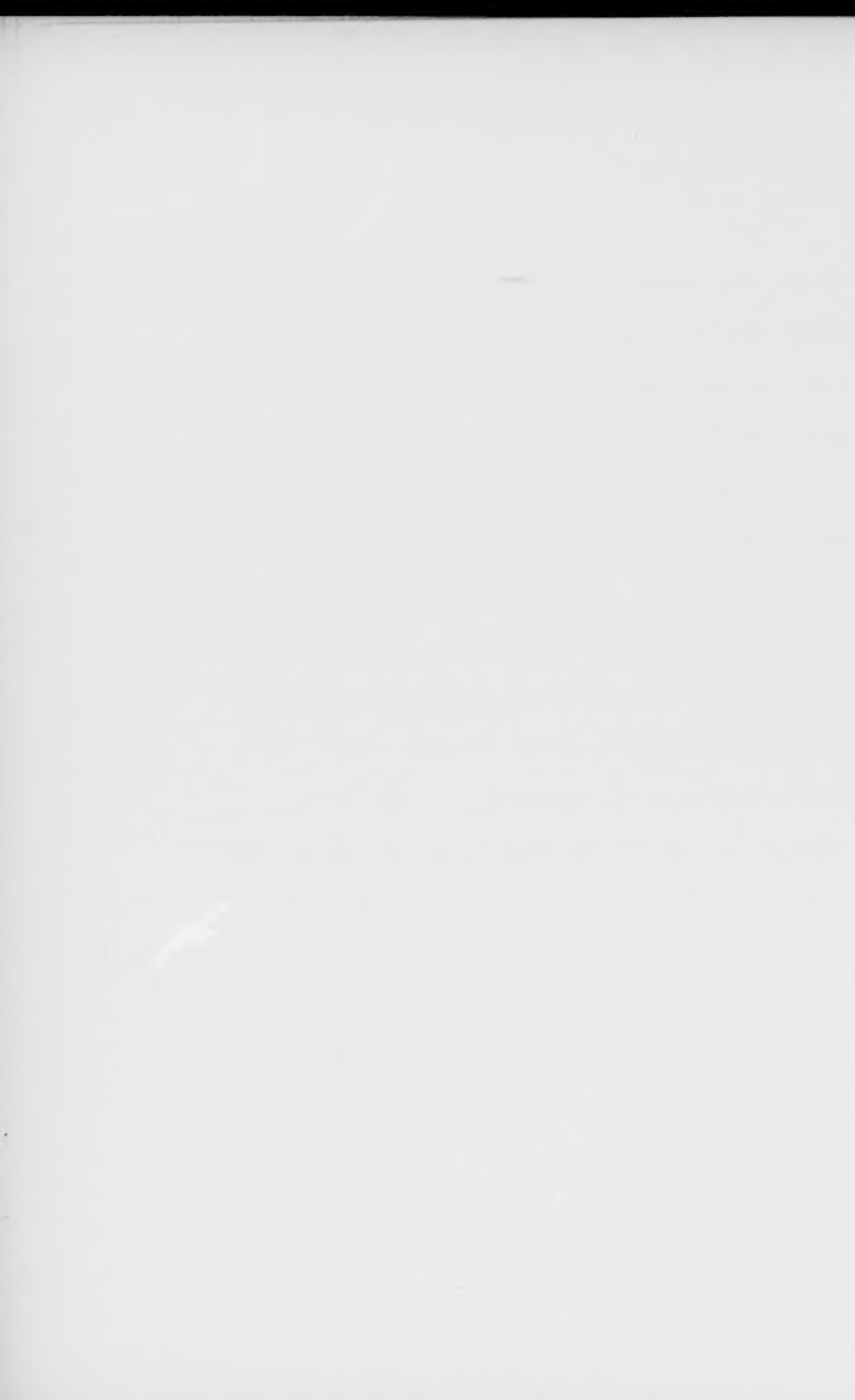
Meanwhile, Bartels had requested review of his authorized fees, and on June 20, 1989 the SSA increased the authorization to \$3,000.00 and instructed Bartels to seek payment from Frazer. Bartels then filed suit in district court stating that Frazer refused to pay the balance owed. The SSA then created an overpayment and paid Bartels the remaining \$706.50 of his authorized fee, but Bartels refused to dismiss his suit, and instead sought injunctive relief to prevent similar future incidents.

In each case, the district court

— — — — —

dismissed the complaints for lack of subject-matter jurisdiction on the basis of its belief that 42 U.S.C. § 405(g) and (h) precluded the review of attorney's fees determinations made by the Secretary. The court further noted that even if it had jurisdiction, dismissal was still warranted because a district court had held in Trekas v. Bowen, No. LR-C-82-619 (E.D. Ark. 1988), that the SSA's failure to withhold a sufficient amount of past-due benefits was unintentional, and thus injunctive relief was inappropriate.

The two cases were consolidated for appeal to the Court of Appeals for the Eighth Circuit, which affirmed the district court orders.



ARGUMENT

THE DISTRICT COURT ERRED IN DISMISSING THE PETITIONER'S CLAIM, FOR THE ACTIONS OF THE SECRETARY VIOLATED THE DUE PROCESS RIGHTS OF THE PETITIONER.

- A. The Petitioner presents a colorable constitutional claim, thus furnishing jurisdiction over the fee dispute.

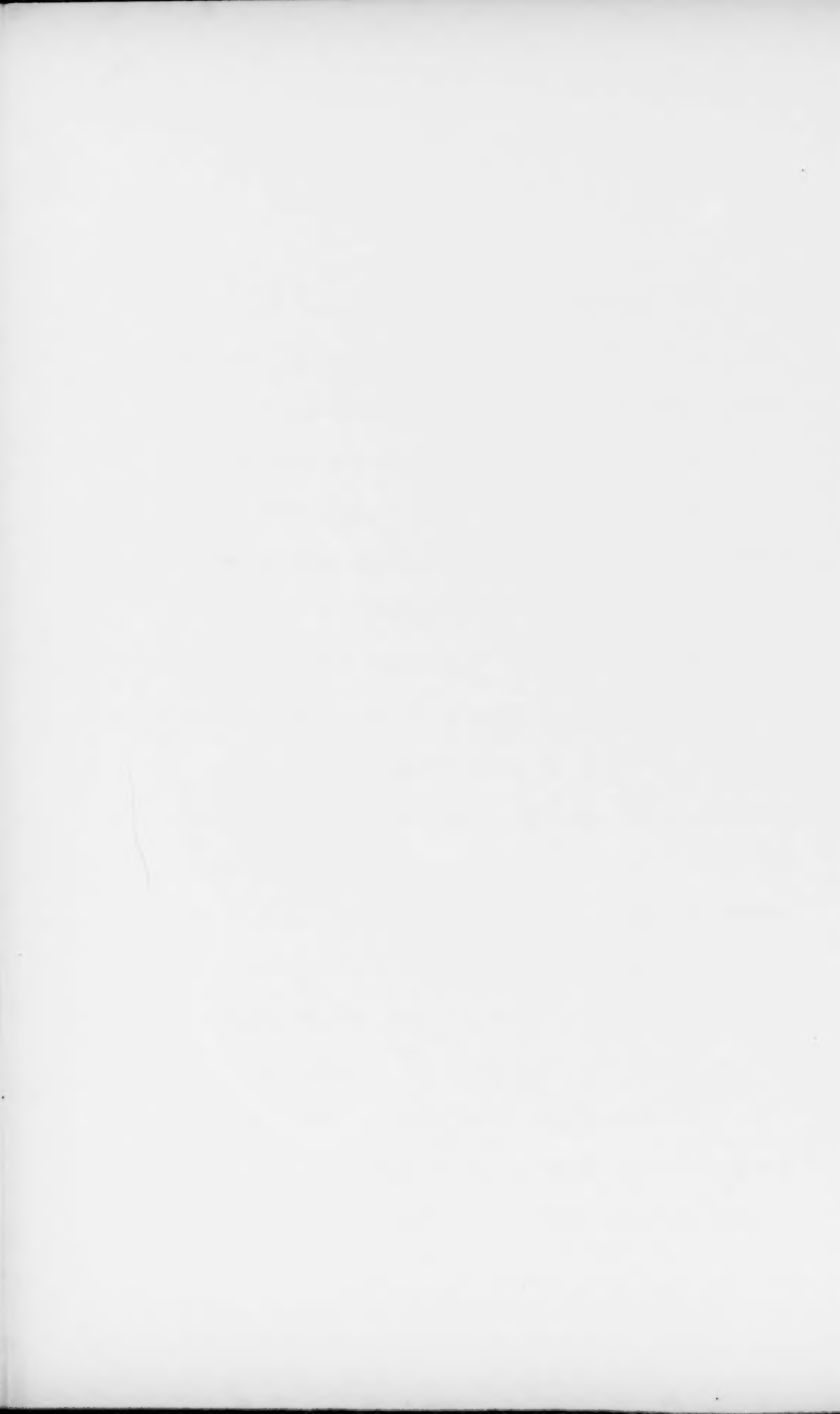
Under the provisions of the Social Security Act, an attorney who represents a successful claimant for disability benefits may receive payment for attorney's fees out of past-due benefits owed to the claimant. 42 U.S.C. § 406. Under this provision, the Secretary is authorized to prescribe the fee to be awarded and must certify for payment to the claimant's attorney the amount which is awarded. An attorney may seek review of a fee determination within 30 days after the date of the notification of the fee



award.

The Petitioner acknowledges that under 42 U.S.C. § 405(g), judicial review of the Secretary's decisions is normally limited to "final decisions of the Secretary made after a hearing," and that the Secretary's fee determination was made without a hearing pursuant to § 406(a). However, this Court has held that judicial review of attorney's fees decisions under § 406(a) is not completely precluded. In Califano v. Sanders, 430 U.S. 99, 109 (1977), the Court concluded that where an appellant demonstrates a "colorable constitutional claim," judicial review of the decision of the Secretary may be had despite the lack of a hearing.

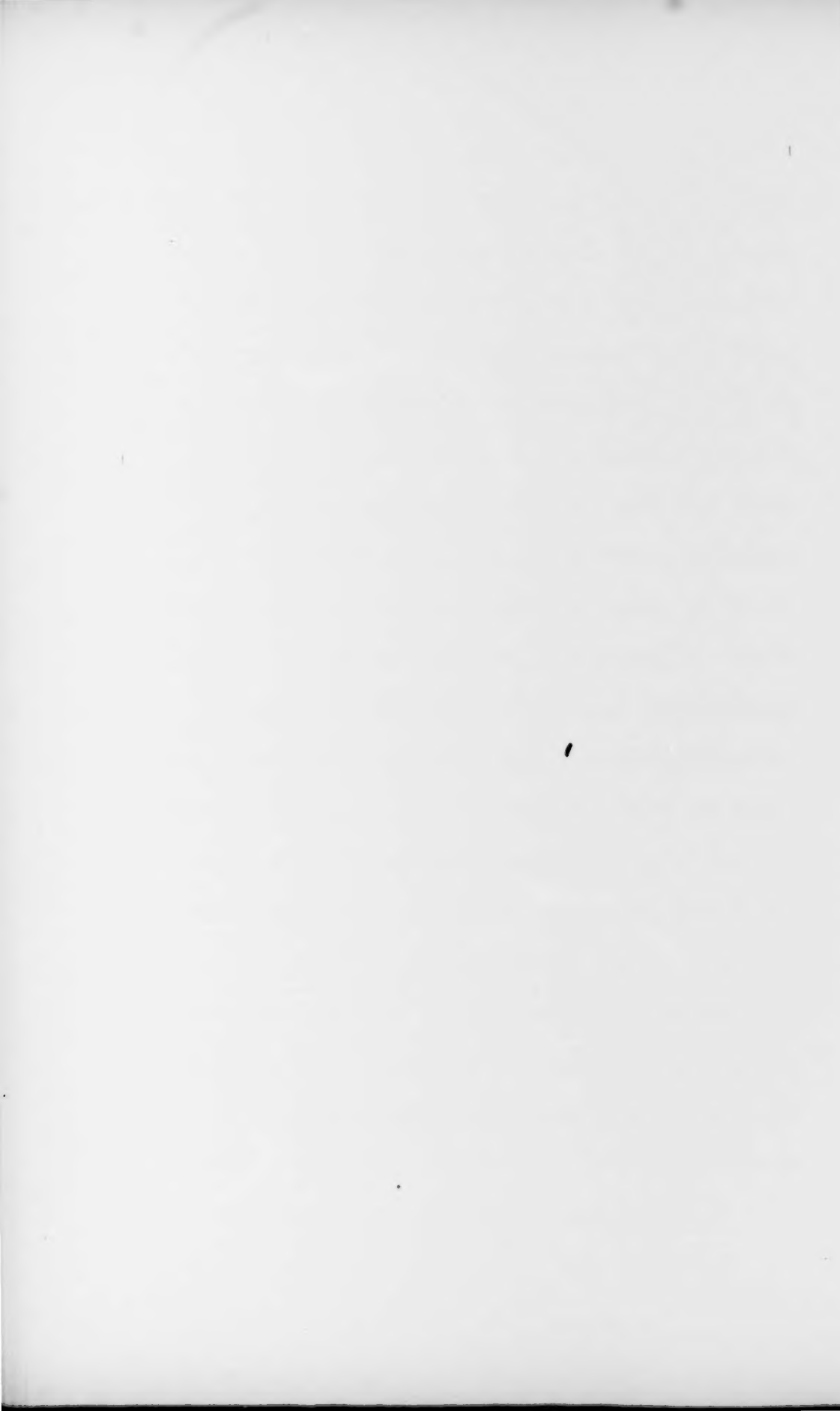
In this case, the Petitioner has demonstrated such a colorable constitutional claim, and thus the district court



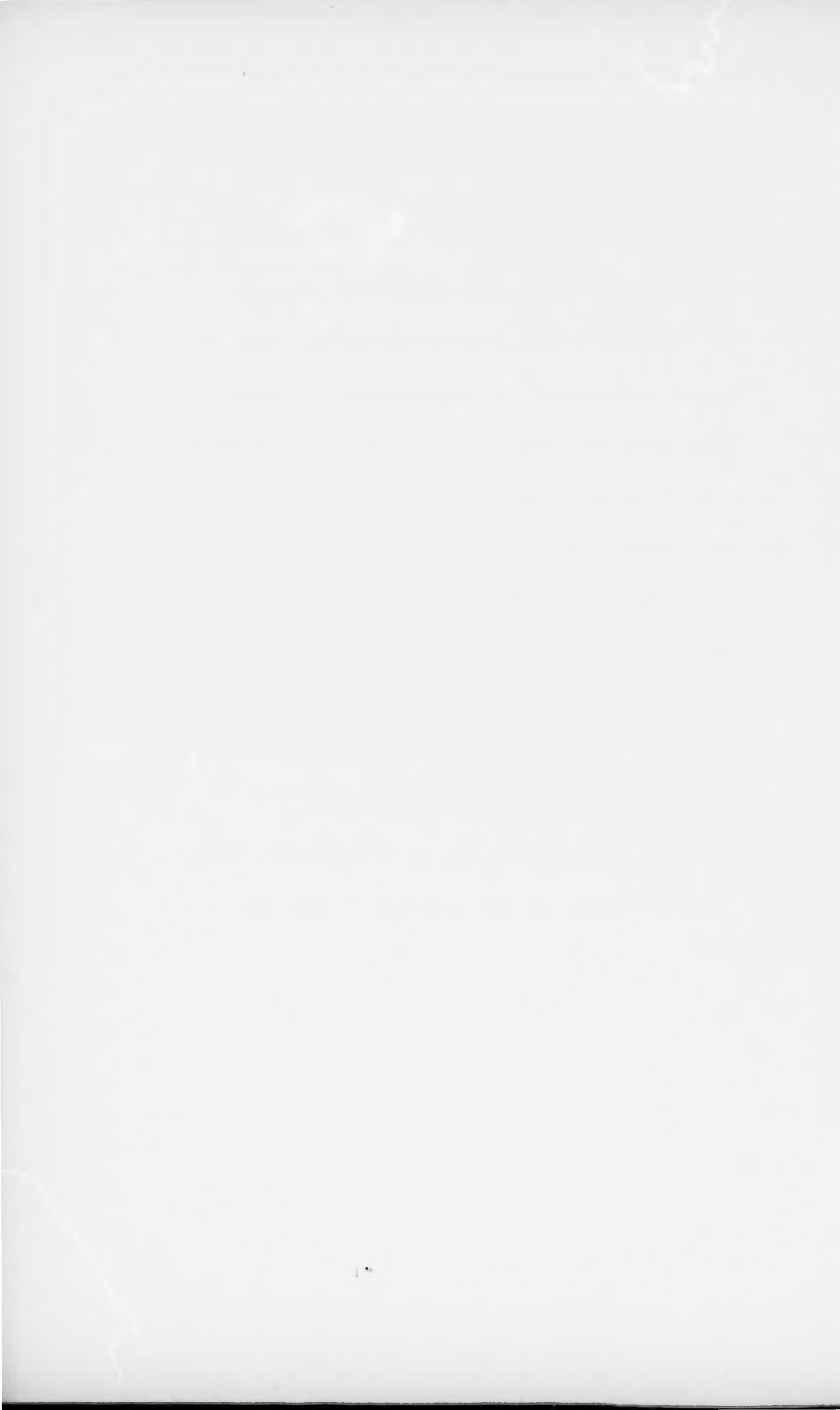
erred in dismissing the case on the basis of a lack of jurisdiction. First, it is well established that an attorney has a property interest in administrative attorney's fees awarded by the Secretary once the fee is set. See Thomanson v. Schweker, 692 F.2d 333 (4th Cir. 1982).

In fact, the Secretary has conceded below that "[t]here may be a deprivation of the attorney's property interest in those instances where the Secretary has authorized an administrative fee, then released to the claimant past due benefits withheld for the payment of an attorney fee" (Brief for Appellee at 14). Thus, in this case, the Petitioner had a protected property interest in his attorney's fees at the moment they were awarded by the Secretary.

Second, the facts of the cases be-

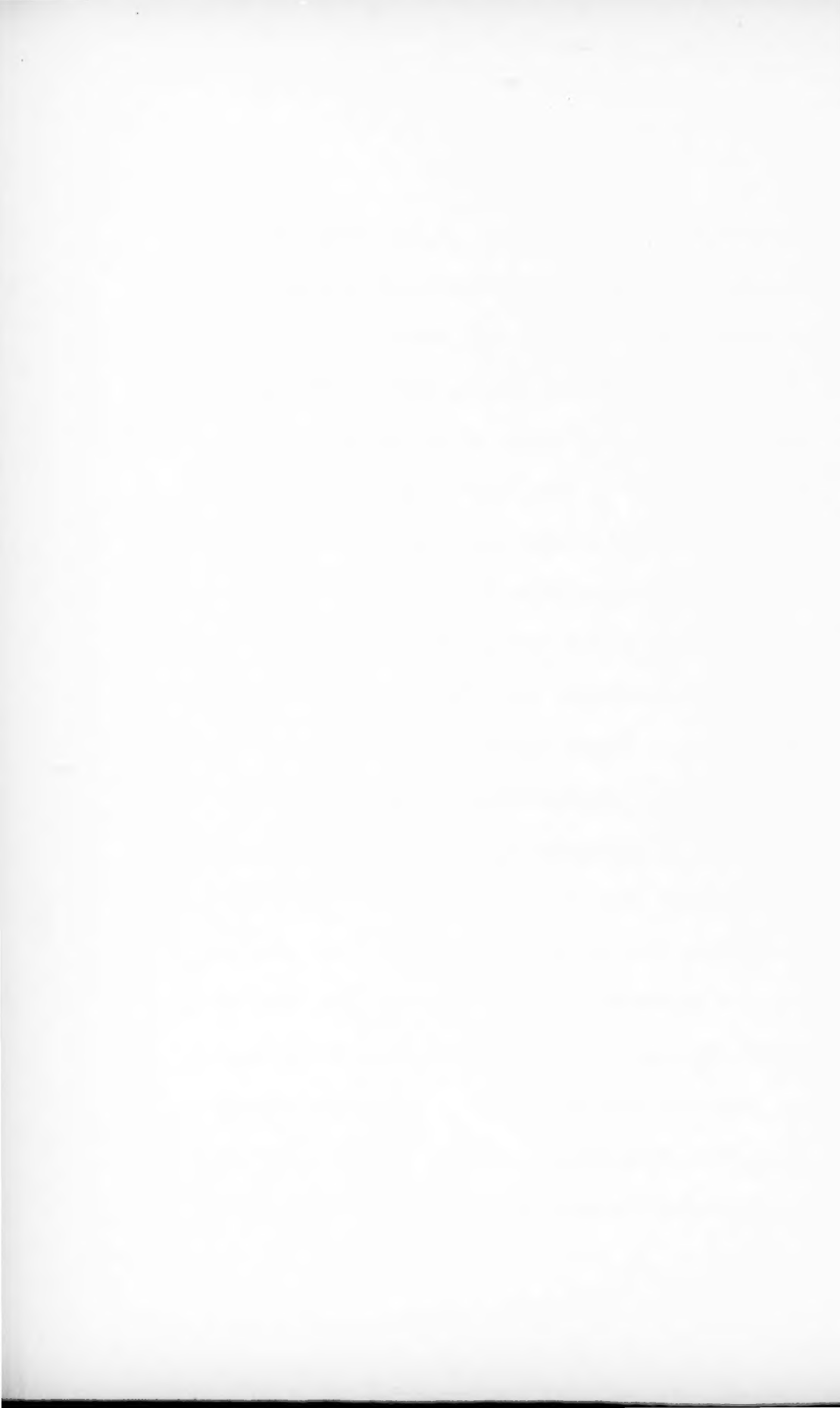


fore this Court--as well as dozens of similar cases--demonstrate the Secretary's efforts both to undermine the ability of disability claimants to obtain counsel and to deprive attorneys of their fees by overpaying the disability claimant and then requiring an attorney to seek the balance of his fee from the claimant. This practice results in counsel being uncompensated for a portion of the work he has done and, because of the administrative practices of the SSA, leaves the filing of a suit against the SSA as the only viable option for the collection of fees. In this case, because of the Secretary's refusal to withhold adequate past-due benefits, and because of the unnecessary delay and subsequent failure to take the necessary administrative steps to ensure that the



Petitioner's fees were paid, the Petitioner was denied his property rights without due process of law.

The district court and Eighth Circuit did not address this constitutional issue, despite the fact that it was presented in the complaints and on appeal. The Secretary contended below that the Petitioner's due process rights were not violated because the administrative procedures in place provide sufficient post-deprivation protections. Analogizing to Copaken v. Secretary of Health, Education & Welfare, 590 F.2d 729 (8th Cir. 1979), in which the court held that the Secretary's procedural safeguards for the determination of fee amounts were adequate to protect property rights of an attorney, the Secretary argued below that the legitimate interest in ensuring that the



claimant's past-due benefits are not withheld for protracted periods supported the Secretary's actions and negated any due process claim brought by attorneys whose fees were delayed.

This argument is meritless for a number of reasons. First, as a practical matter, the Secretary's concern for the speedy delivery of past-due benefits is merely a pretext, as is evidenced by the fact that in each of these cases the Secretary demonstrated no interest in paying the claimants benefits to which they were entitled until claimants hired an attorney to enforce their rights through an appeal of the Secretary's denial of benefits. Second, the policy of giving claimants their benefits quickly could be equally served by an administrative system in which an attorney received prompt



review of a fee determination. As it now stands, an attorney has only 30 days to file for a reconsideration of fees. In light of the long period of the pendency of such disability benefit claims--a process which takes years--a short delay in releasing a portion of past-due benefits in order to ensure that the proper amount of fees have been awarded would not seriously impact on claimants, particularly when it is considered that the benefits held pending final resolution of attorney's fees would only constitute the difference between the fees originally awarded and 25% of the benefits.

As these and other cases repeatedly demonstrate, the Secretary's position in the matter of attorney's fees is not based on a concern for disability claimants, but rather is based on a consistent

policy designed to discourage attorneys from handling disability claims, which in turn will reduce the number of appeals of denials of claims.

An essential component of due process is that a person may not be deprived of a protected property interest without the opportunity to contest the deprivation at some type of hearing. Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985); Armstrong v. Manzo, 380 U.S. 545 (1965). To pass constitutional muster, the opportunity to be heard "must be granted at a meaningful time and in a meaningful manner," not in a manner which imposes unnecessary burdens on the person facing a deprivation. Armstrong v. Manzo, supra, 380 U.S. at 552 (emphasis added). Ideally, a full hearing should be given prior to a deprivation, Goldberg

v. Kelly, 397 U.S. 254, 261 (1970), but various considerations may permit a postponement of the hearing when a prompt postdeprivation hearing is used. Cleveland Board of Education v. Loudermill, supra. Too much postponement for too long will be a violation of due process. Id.

Moreover, precedent from this Court clearly indicates that the availability of a collateral judicial remedy cannot sustain a deprivation procedure which provides no hearing either before or after the deprivation. E.g., Sniadach v. Family Finance Corp., 395 U.S. 337 (1969); Goldberg v. Kelly, supra. In other words, if an individual must resort to the courts to remedy a deprivation of property, the government has failed to provide due process of law.

In this case and others, attorneys who had a protected property interest in attorney's fees were initially denied the fees, then awarded the fees after a lengthy delay, and then ultimately were required to go to court to get payment of the fees. The Secretary's procedure in awarding attorney's fees was to grant an initial amount of fees which was insufficient to compensate the Petitioner for his time, and to release the sole source of funds from which attorney's fees could reasonably be expected to be collected. The Petitioner then was required to petition for a reconsideration of fees, at which time the Secretary indicated that the Petitioner should look to the disability claimant for payment. After this obviously unsuccessful attempt was exhausted, the subsequent requests to the

Secretary for payment were ignored, and these actions were instituted.

Thus, the repeated practice of the Secretary, which has consistently delayed payment of attorney's fees and has required the use of the courts to recoup payments, has violated the due process rights of the Petitioner. Accordingly, the Petitioner has stated a colorable constitutional claim and the district court erred in dismissing this action.

- B. The Secretary should be enjoined from releasing payments to disability claimants prior to ensuring that the claimants' counsel has received his attorney's fees.

The district court opinions in this case both noted that even if the courts had jurisdiction to hear the Petitioner's case, dismissal was nevertheless war-

ranted because the Secretary's failure to withhold adequate amounts of attorney's fees was unintentional, and thus injunctive relief was inappropriate. Citing Trekas v. Bowen, No. C-82-619 (E.D. Ark. 1988), the court stated that the Secretary has no policy of inadvertently paying all past-due benefits to the disability claimant in order to hinder the attorney's ability to collect fees.

The facts belie this conclusion. The proliferation of cases involving the Secretary's systematic failure to withhold attorney's fees strongly suggests that the Secretary does indeed have such a policy, despite his repeated description of his actions as being "inadvertent." See, e.g., Trekas v. Bowen, supra; Pittman v. Sullivan, 911 F.2d 42 (8th Cir. 1990); Davis v. Bowen, 894 F.2d

271 (8th Cir. 1989), cert. denied, 110 S. Ct. 1922 (1990).

This case presents the Court with the opportunity to correct an injustice which impacts on a wide range of disability claimants and their attorneys. Thus, it involves an important federal and constitutional question necessitating the granting of the Petition for a Writ of Certiorari.

CONCLUSION

For all of the foregoing reasons, the Petitioner requests this Court to rule that the district court erred in dismissing his complaint for a lack of

jurisdiction, and to grant the Petition
for a Writ of Certiorari.

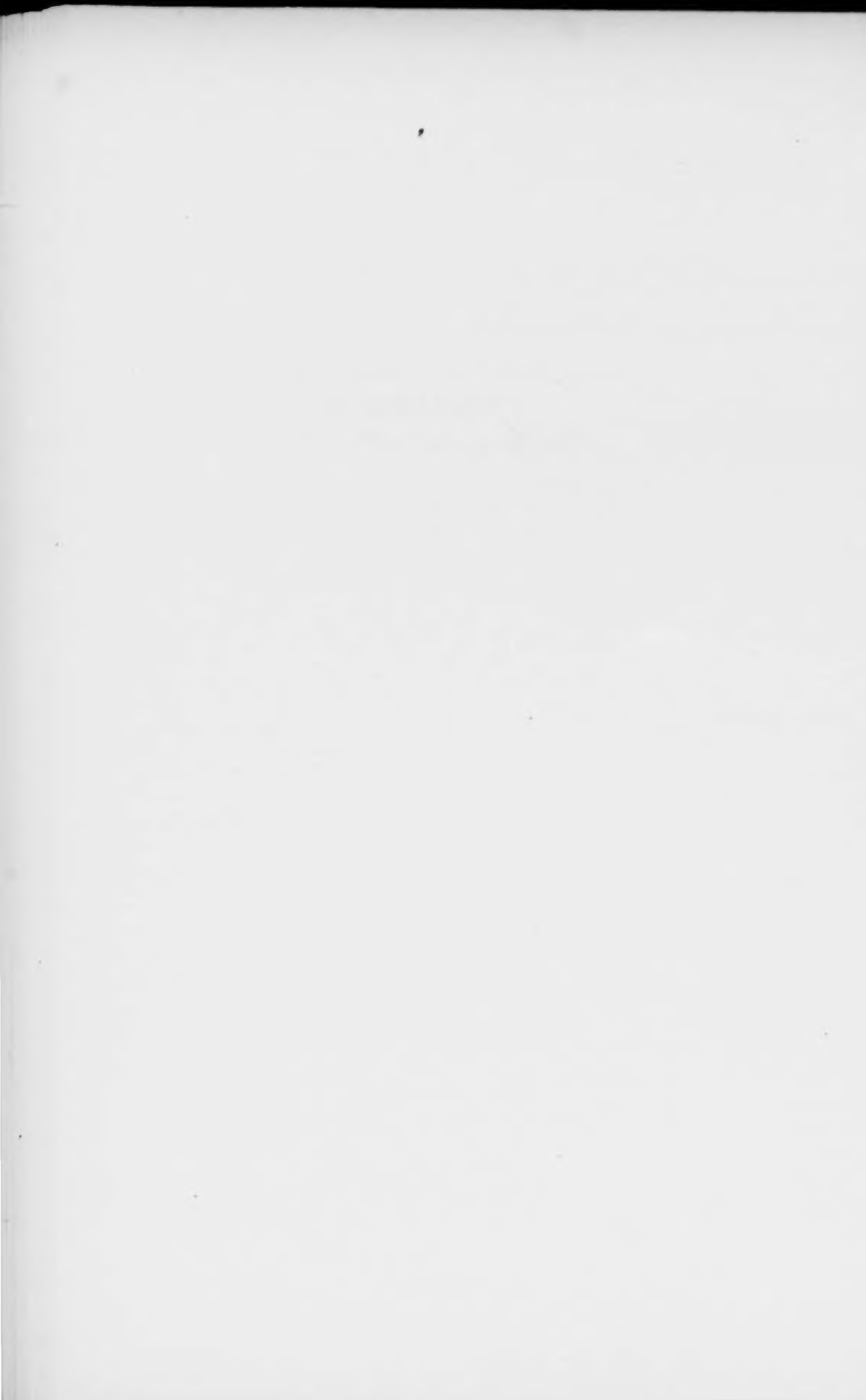
Respectfully submitted,
ORIGINAL SIGNED BY

Anthony W. Bartels

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(501) 972-5000

Pro se.

December 7, 1990.



NO.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1990

ANTHONY BARTELS,

Petitioner,

v.

LOUIS W. SULLIVAN,
SECRETARY OF HEALTH AND HUMAN SERVICES,

Respondent.

WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

APPENDIX

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Pro se.



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United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 90-1116EA

Anthony Bartels,	*
	*
Appellant,	* Appeals from the
	* United States
v.	* District Court for
	* the Eastern
	* District of
Secretary of Health	* Arkansas.
and Human	*
Services, Louis W.	* [UNPUBLISHED]
Sullivan,	*
	*
Appellee.	*

No. 90-1117EA

Anthony Bartels,	*
	*
Appellant,	*
	*
v.	*
	*
Secretary of Health	*
and Human	*
Services, Louis W.	*
Sullivan,	*
	*



Appellee.

*

Submitted: April 30, 1990

Filed: August 17, 1990

Before MAGILL, Circuit Judge, FLOYD R.
GIBSON,
Senior Circuit Judge, and BEAM, Circuit
Judge.

PER CURIAM.

Having reviewed the briefs and records in these consolidated appeals, we conclude that an opinion would have no precedential value. Because no error of law appears, we affirm the orders of the district court dismissing appellant's complaints. See 8th Cir. R. 47B.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH
CIRCUIT.

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

Nos. 90-1116/1117EA

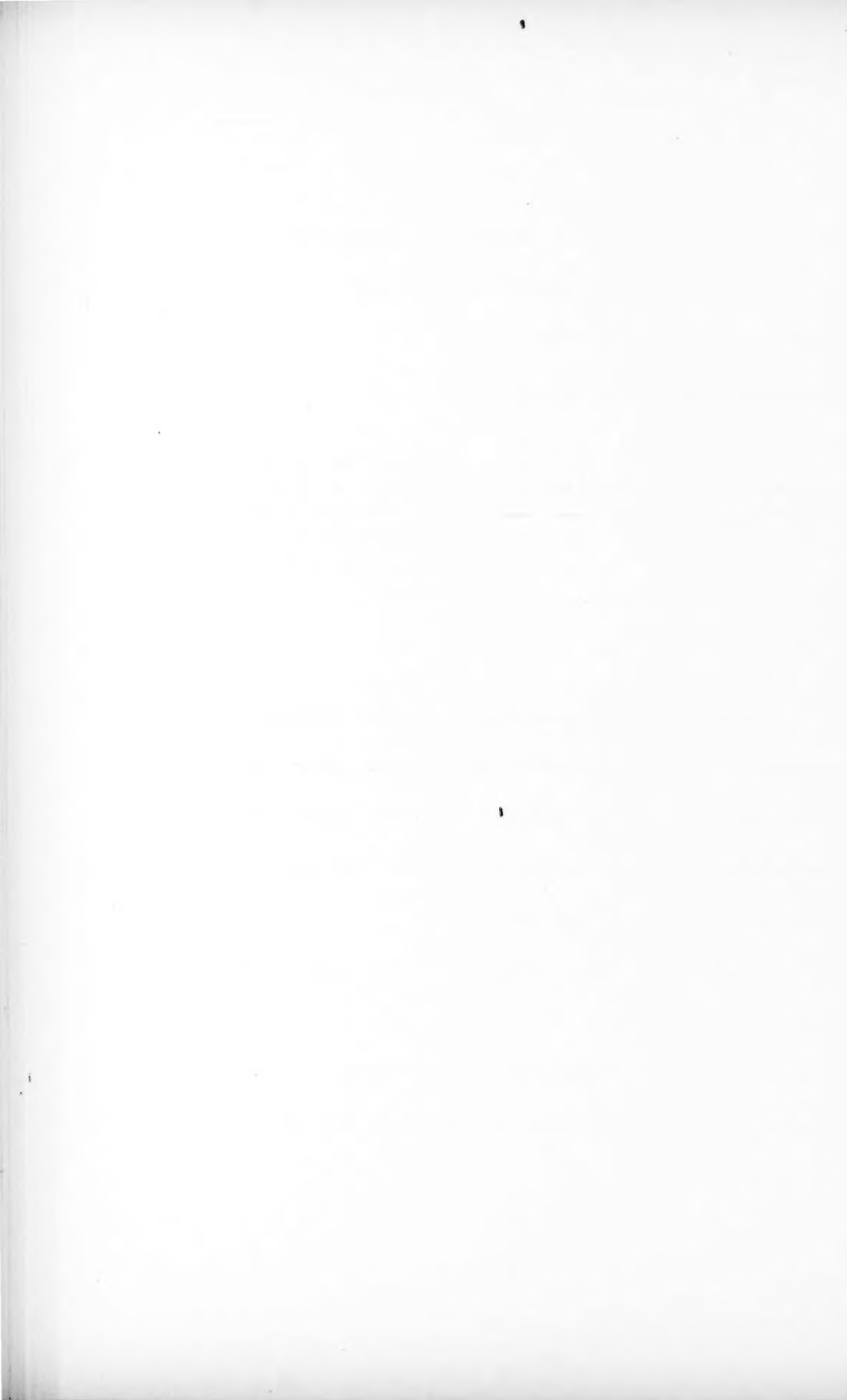
Anthony Bartels,	*	
	*	
Appellant,	*	
	*	Order Denying
Secretary of Health	*	Petition for
and Human Services,	*	Rehearing and
Louis W. Sullivan,	*	Suggestion for
	*	Rehearing En
Appellee.	*	Banc

Appellant's suggestion for rehearing en banc has been considered the the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

Petition for rehearing by the panel is also denied.

September 24, 1990

Order Entered at the Direction of the Court:



/s/ Robert D. St. Vrain
Clerk, U.S. Court of Appeals, Eighth
Circuit

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION

ANTHONY W. BARTELS

PLAINTIFF

v.

NO. J-C-89-131

LOUIS W. SULLIVAN, Secretary
of the Department of Health
and Human Services

DEFENDANT

ORDER

Defendant, the Secretary of the Department of Health and Human Services, has filed the pending motion to dismiss. Because the motion has merit, it is granted. The complaint at bar is therefore dismissed.

The material facts are apparently undisputed. Plaintiff, Anthony W. Bartels, a practicing attorney, entered into a contract with Thomas Sanderson ("Sanderson") to represent him before the Social Security Administration ("SSA") in



an attempt to obtain disability benefits. It was apparently agreed that were the case won, plaintiff would receive one-fourth ($\frac{1}{4}$) of his client's past due benefits.

After reviewing his claim, the SSA determined that Mr. Sanderson was entitled to a period of disability and disability benefits pursuant to 42 U.S.C. §§ 416(i) and 423. The SSA calculated the amount of past due benefits to be \$23,353.00. As required by 42 U.S.C. § 405(a), the SSA withheld twenty-five percent of that amount, or \$5,838.25, for the possible direct certification by the SSA of an authorized attorney fee.

Thereafter, the SSA authorized plaintiff a fee for legal services provided at the administrative level in the amount of \$4,000.00. Pursuant to a SSA policy, \$4,000.00 was certified for pay-



ment by the SSA to plaintiff. The balance of the twenty-five percent withheld by the SSA, or \$1,838.25, was released to Mr. Sanderson.

Because he was apparently dissatisfied with the award of \$4,000.00, plaintiff requested administrative review of the authorized amount. After considering his request, the SSA increased the authorization by \$500.00 to \$4,500.00. Because the balance of the withheld funds had already been released to Mr. Sanderson, nothing remained available for a direct certification by the SSA. Plaintiff was therefore instructed by the SSA, under a SSA policy, to seek the additional authorized fee, or \$500.00, from Mr. Sanderson. Plaintiff did in fact attempt to collect the additional fee from Mr. Sanderson, but his attempt was unsuccessful. Plaintiff then requested that an

overpayment be created. Although no immediate action was taken by the SSA, it now readily admits that it "should have at that time created an overpayment of \$500." Brief at 3.

Plaintiff, as a result of the foregoing, filed the complaint at bar. It was, and still is, his position that the SSA deprived him of due process of law by failing to comply with 20 C.F.R. § 404.501(a)(8) when it released "plaintiff's money to Mr. . . . Sanderson as an underpayment." Complaint at 3. He sought damages in the amount of \$500.00 and an injunction "against the [SSA] ordering [it] to stop [its] actions of repeatedly releasing all funds to the claimant before attorney's fees are paid in Title II cases." Complaint at 4.

Approximately two and one-half months after the complaint was filed, the



SSA created an overpayment and paid plaintiff the remaining \$500.00 of his authorized fee. Despite receiving the balance of the authorized fee, plaintiff expressed a desire to continue to litigate this case:

Although SSA did finally pay the balance of the attorney's fee, it was not until the plaintiff was out the expense of filing suit, as well as his time litigating this matter. Therefore, plaintiff would ask that the Court grant the injunction prayed for in his Complaint, as well as costs of suit and an EAJA attorney's fee for time spend litigating this matter.

Second Report to the Court. Defendant thereafter filed the pending motion to dismiss.

The motion at bar is predicated upon two assertions. First, the Court lacks jurisdiction to provide the relief plaintiff seeks. And second, assuming, arguendo, that the Court has jurisdiction,



plaintiff is not entitled to injunctive relief because the actions of the SSA were merely inadvertent. Both assertions have merit.

The ability of this Court to review an act of the SSA is limited by 42 U.S.C. § 405 (g). That section provides, in part, the following:

Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within further time as the Secretary may allow.

The regulations of the SSA do not provide for a hearing on an attorney's petition for fees. See Copaken v. Secretary of Health, Education & Welfare, 590 F.2d



729, 731 (8th Cir. 1979).¹ It is clear that judicial review not provided for in § 405(g) is precluded by 42 U.S.C. § 405 (h). See id. Thus, it follows, as the Court of Appeals for the Eighth Circuit has previously held, that "fee awards made by the Secretary are not subject to the district court's review." Russell v. Sullivan, 887 F.2d 170, 171 (8th Cir. 1989) [quoting Id. (agency fee determinations committed to agency discretion and not judicially reviewable)]. The Court therefore finds that it has no jurisdiction to adjudicate the dispute at bar.

¹In addition, it is clear that Congress did not intend to include attorneys when it provided either for hearings upon the request of "any individual applying for a payment under this subchapter," 42 U.S.C. § 405(b), or for judicial review of a final decision when requested by a "party" to a hearing. See Copaken v. Secretary of Health, Education & Welfare, 590 F.2d at 731.

Assuming, arguendo, that the Court has jurisdiction over this dispute, dismissal is still warranted. United States District Judge G. Thomas Eisele previously found that the SSA has no "policy" of inadvertently paying all past due benefits to claimants in an attempt to hinder the collection of attorney's fees. See Trekas v. Bowen, No. LR-C-82-619 (E.D. Ark. June 14, 1988).² This Court agrees and accepts defendant's representation that the SSA's failure to withhold a sufficient amount of past due benefits was unintentional.³

Given the foregoing, the Court finds that the motion to dismiss should be, and is, granted. The pending motion to con-

²See Defendant's Exhibit E.

³The Court acknowledges, however, that at some point, continued inadvertence might be some evidence of a "policy" to hinder the collection of attorney's fees.



solidate filed by plaintiff is denied.

The complaint at bar is dismissed.

IT IS SO ORDERED this 13 day of December, 1989.

/s/ Henry Woods
HENRY WOODS, U.S. District Judge



IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION

ANTHONY W. BARTELS

PLAINTIFF

vs.

NO. J-C-89-142

LOUIS W. SULLIVAN, Secretary
of the Department of Health
and Human Services

DEFENDANT

ORDER

Pending before the Court is defendant's motion to dismiss. The following facts appear to be undisputed. Plaintiff, a practicing attorney, represented Thomas Frazier before the Social Security Administration ("SSA") in an attempt to obtain disability benefits. On July 14, 1987, plaintiff and Thomas Frazier executed a contract entitling plaintiff to one-fourth of Mr. Frazier's past due benefits as an attorney's fee if the case was won. Plaintiff originally filed suit



alleging that defendant had been awarded backpay in the amount of \$13,881.00. Based upon this assumption, plaintiff petitioned for a fee in the amount of \$3,470.25. On May 2, 1989, defendant approved an initial attorney's fee of \$1,258.00.¹ Defendant stated that plaintiff's requested fee was reduced to the amount of \$1,258.00 as plaintiff's agreement with his client was for twenty-five percent of past due benefits. On May 23, 1989, SSA calculated the amount of past due benefits to which Mr. Frazier's auxiliaries were entitled based on the favorable determination and determined the amount to be \$2,826.00. See Memorandum in Support of Defendant's Motion for Summary Judgment, Exhibit B. Since the

¹The past due benefits in this case were actually \$5,032.00, twenty-five percent of which would be \$1,258.00. See Memorandum in Support of Defendant's Motion to Dismiss, Exhibit A.



full authorized attorney's fee of \$1,258.00 had already been released to Mr. Bartels, the remaining \$706.50 was released to Mr. Frazier. On June 20, 1989, and pursuant to plaintiff's request, defendant increased the attorney's fee to \$3,000.00. On July 13, 1989, plaintiff received from defendant a check in the amount of \$1,258.00 for attorney's fees. Plaintiff was advised to collect the balance of \$1,742.00 from his client. When plaintiff was unsuccessful in recouping the money from his client, he filed this lawsuit seeking damages in the amount of the underpayment, an injunction, costs, and attorney's fees.

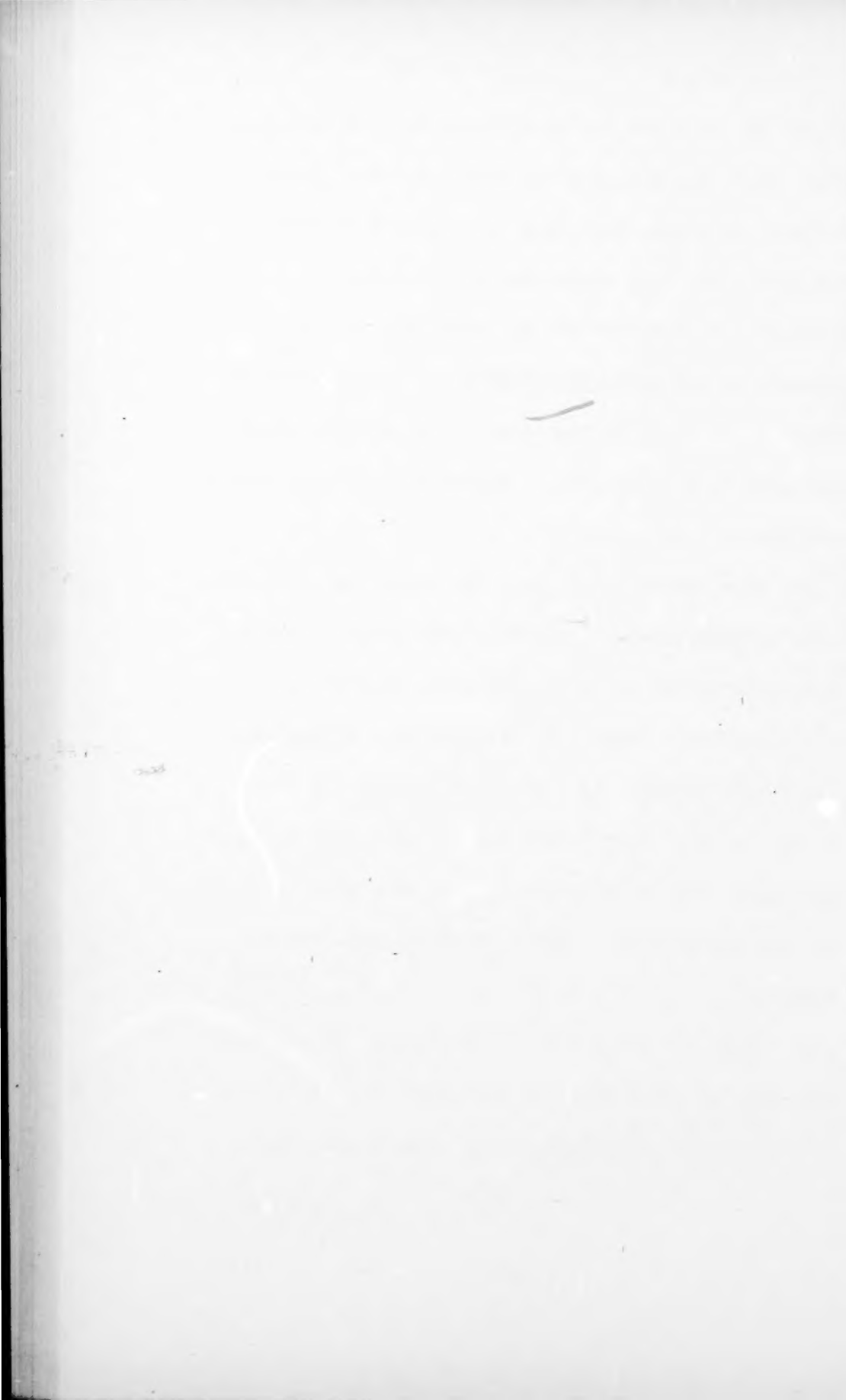
On September 26, 1989, approximately two months after this lawsuit was filed, SSA created an overpayment and paid Mr. Bartels the remaining \$706.50 of his authorized fee. Plaintiff concedes that



this is all he is entitled to and prayed for, but continues to pursue the lawsuit alleging that SSA did not pay him until he was out the expense of filing suit. Plaintiff continues to request an injunction as well as costs of suit and an EAJA attorney's fee for time spent litigating this matter. Defendant filed this motion to dismiss.

The motion at bar is predicated upon two assertions. First, the Court lacks jurisdiction to provide the relief plaintiff seeks. Second, assuming, arguendo, that the Court has jurisdiction, plaintiff is not entitled to injunctive relief because the actions of the SSA were merely inadvertent. Both assertions have merit.

The ability of this Court to review an act of the SSA is limited by 42 U.S.C. § 405 (g). That section provides, in



part, the following:

Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty (60) days after the mailing to him of notice of such decision or within further time as the Secretary may allow.

That section of the SSA does not provide for a hearing on an attorney's petition for fees. See Copaken v. Secretary of Health, Education and Welfare, 590 F.2d 729, 731 (8th Cir. 1979).² It is clear that judicial review not provided for in § 405(g) is precluded by 42 U.S.C. §

²In addition, it is clear that Congress did not intend to include attorneys within the meaning of the statute as it provided either for hearings upon the request of "any individual applying for a payment under this subchapter," 42 U.S.C. § 405(b), or for judicial review of a final decision when requested by a "party" to a hearing. See Copaken v. Secretary of Health, Education and Welfare, 590 F.2d at 731.



405(h). See Id. Thus, it follows, as the Court of Appeals for the Eighth Circuit has previously held, that "fee awards made by the Secretary are not subject to the district court's review."

Russell v. Sullivan, 887 F.2d 170, 171 (8th Cir. 1989) [quoting Id. (agency fee determinations committed to agency discretion and not judicially reviewable)]. The Court, therefore, finds that it has no jurisdiction to adjudicate the dispute at bar.

Assuming, arguendo, that the Court has jurisdiction over this dispute, dismissal is still warranted. United States District Judge G. Thomas Eisele previously found that the SSA has no "policy" of inadvertently paying all past due benefits to claimants in an attempt to hinder the collection of attorney's fees. See Trekas v. Bowen, No. LR-C-82-619 (E.D.



Ark. 1988).³ This Court agrees and accepts defendant's representation that the SSA's failure to withhold a sufficient amount of past due benefits was unintentional.⁴

Given the foregoing, the Court finds that the motion to dismiss should be, and is, granted. The complaint at bar is dismissed.

Dated this 21st day of December,
1989.

/s/ Stephen M. Reasoner
UNITED STATES DISTRICT JUDGE

³See Memorandum in Support of Defendant's Motion to Dismiss, Exhibit E.

⁴The Court acknowledges, however, that at some point, continued inadvertence might be some evidence of a "policy" to hinder the collection of attorney's fees.

(g) Judicial review. Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the District Court of the United States for the District of Columbia [United States District Court for the District of Columbia]. As part of his answer the Secretary shall file a cer-

tified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Secretary or a decision is rendered under subsection (b) hereof which is adverse to an individual who was a party to the hearing before the Secretary, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) hereof, the court shall review only the question of con-

formity with such regulations and the validity of such regulations. The court may, on motion of the Secretary made for good cause shown before he files his answer, remand the case to the Secretary for further action by the Secretary, and it may at any time order additional evidence to be taken before the Secretary, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or his decision, or both, and shall file with the court any such additional and modified findings of fact and decision shall be reviewable only to the extent provided for review of the origin-

al findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in such office.

(h) Finality of Secretary's decision. The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 1331 or 1346 of title 28, United

States Code [28 USCS § 1331 or 1346], to recover on any claim arising under this title [42 USCS §§ 401 et seq.].

§ 406. Representation of claimants before the Secretary

(1) The Secretary may prescribe rules and regulations governing the recognition of agents or other persons, other than attorneys as hereinafter provided, representing claimants before the Secretary, and may require of such agents or other persons, before being recognized as representatives of claimants that they shall show that they are of good character and in good repute, possessed of the necessary qualifications to enable them to render such claimants valuable service, and otherwise competent to advise and assist such claimants in the presentation of their cases. An attorney in good standing who is admitted to practice



before the highest court of the State, territory, District, or insular possession of his residence or before the Supreme Court of the United States or the inferior Federal courts, shall be entitled to represent claimants before the Secretary. The Secretary may, after due notice and opportunity for hearing, suspend or prohibit from further practice before him any such person, agent, or attorney who refuses to comply with the Secretary's rules and regulations or who violates any provision of this section for which a penalty is prescribed. The Secretary may, by rule and regulation, prescribe the maximum fees which may be charged for services performed in connection with any claim before the Secretary under this title [42 USCS §§ 401 et seq.], and any agreement in violation of such rules and regulations shall be void.

Whenever the Secretary, in any claim before him for benefits under this title [42 USCS §§ 401 et seq.], makes a determination favorable to the claimant, he shall, if the claimant was represented by an attorney in connection with such claim, fix (in accordance with the regulations prescribed pursuant to the preceding sentence) a reasonable fee to compensate such attorney for the services performed by him in connection with such claim. If as a result of such determination, such claimant is entitled to past-due benefits under this title [42 USCS §§ 401 et seq.], the Secretary shall, notwithstanding section 205(i) [42 USCS § 405(i)], certify for payment (out of such past-due benefits) to such attorney an amount equal to whichever of the following is the smaller: (A) 25 per centum of the total amount of such past-due bene-



fits, (B) the amount of the attorney's fee so fixed, or (C) the amount agreed upon between the claimant and such attorney as the fee for such attorney's services. Any person who shall, with intent to defraud, in any manner willfully and knowingly deceive, mislead, or threaten any claimant or prospective claimant or beneficiary under this title [42 USCS §§ 401 et seq.] by word, circular, letter or advertisement, or who shall knowingly charge or collect directly or indirectly any fee in excess of the maximum fee, or make any agreement directly or indirectly to charge or collect any fee in excess of the maximum fee, prescribed by the Secretary shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall for each offense be punished by a fine not exceeding \$500 or by imprisonment not exceeding one year, or both.



(b)(1) Whenever a court renders a judgment favorable to a claimant under this title [42 USCS §§ 401 et seq.] who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment, and the Secretary may, notwithstanding the provisions of section 205(i) [42 USCS § 405(i)], certify the amount of such fee for payment to such attorney out of, and not in addition to, the amount of such past-due benefits. In case of any such judgment, no other fee may be payable or certified for payment for such representation except as provided in this paragraph.

(2) Any attorney who charges, de-



mands, receives, or collects for services rendered in connection with proceedings before a court to which paragraph (1) is applicable any amount in excess of that allowed by the court thereunder shall be guilty of a misdemeanor and upon conviction thereof shall be subject to a fine of not more than \$500, or imprisonment for not more than one year, or both.